89-726

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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ACRISON, INC.,

Petitioner,

vs.

JOHN HITESMAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this product liability action, after the jury answered special verdict questions absolving Petitioner-Defendant of liability, the District Court concluded that one of the special verdict questions did not correctly frame the factual issues. The District Court proceeded to "reframe" that question, even though the question had already been answered by the jury in Petitioner-Defendant's favor, answered the "reframed" question itself, and entered judgment for Respondent-Plaintiff. The Court of Appeals held that such "reframing" of factual issues already determined by a jury was permissible under Rule 49(a), *Fed R. Civ. Proc.*

The following questions are presented:

1. Whether the Court of Appeals adopted an erroneous test under Rule 49(a), *Fed. R. Civ. Proc.*, which test allows a District Court *to reframe* a factual question submitted to and answered by a jury and then to answer the reframed question itself, even though Rule 49(a), by its terms and as construed in other Circuits, only allows a District Court to make findings of fact *to supplement* a jury's special verdict when the special verdict questions omit factual issues necessary to reach a legal conclusion.

2. Does the use of Rule 49(a) to reframe a factual question that had been submitted to and answered by the jury, and to have the reframed question answered by the District Court, deprive the party in whose favor the *jury* answered the question of its Seventh Amendment right to trial by jury?

Parties

Rule 28.1 Statement

Acrison, Inc. has no parent, subsidiary or affiliate corporations.

The caption of the case in this Court contains the names of all current parties. One additional plaintiff, Cindy Hitesman, was dismissed as a party on consent prior to trial.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	11
This Court should grant certiorari to consider whether the use of Rule 49(a), *Fed. R. Civ. Proc.*, to reframe special verdict questions that were submitted to and answered by the jury, and to have the reframed questions answered instead by the District Court, deprives the party in whose favor the jury ruled of his Seventh Amendment right to trial by jury	11
Conclusion	18
Appendix	A-1
October 3, 1988 Rulings of District Court	A-1
October 21, 1988 Opinion and Order of District Court	A-10
October 21, 1988 Judgment of District Court	A-18
January 6, 1989 Order of District Court	A-19

Page

January 10, 1989 Order of District Court A-21

January 11, 1989 Order of District Court A-22

January 18, 1989 Final Judgment of District Court A-27

August 4, 1989 Memorandum Opinion of Court of Appeals A-28

TABLE OF AUTHORITIES

Cases	Page
Aetna Ins. Co. v. *Kennedy ex rel. Bogash*, 301 U.S. 389 (1937)	16
Brenham v. *Southern Pacific Co.*, 328 F. Supp. 119 (W.D. La. 1971), *aff'd mem.*, 469 F.2d 1095 (5th Cir.), *cert. denied*, 409 U.S. 1061 (1972)	14
Cullen v. *Margiotta*, 811 F.2d 698 (2d Cir. 1987)	13
Fortier v. *Dona Anna Plaza Associates*, 747 F.2d 1324 (10th Cir. 1984)	14
Goeken v. *Kay*, 751 F.2d 469 (1st Cir. 1985)	13
Guidry v. *Kem Mfg. Co.*, 604 F.2d 320 (5th Cir.), *cert. denied*, 445 U.S. 929 (1979)	16
Harmon v. *Grande Tire Co.*, 821 F.2d 252 (5th Cir. 1987)	14
In Re Randall, 712 F.2d 1275 (8th Cir. 1983)	15
Lagenderfer v. *Midrex Corp.*, 660 F.2d 523 (4th Cir. 1981)	13
Petree v. *Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987)	17
Rogers v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957)	17
Sentilles v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959)	17
Spectra-Physics, Inc. v. *Coherent, Inc.*, 827 F.2d 1524 (Fed. Cir. 1987)	14
Verge v. *Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978)	16

Page

Statutes

28 U.S.C. § 1254 2

Constitution

United States Constitution, Amendment 7 2

Rules

Rule 49(a), Fed. R. Civ. P ..... *passim*

Rule 28.1, Supreme Court Rules ii

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OPINIONS BELOW

The rulings of the United States District Court for the Middle District of Pennsylvania (Hon. Malcolm Muir, U.S.D.J.), on Special Verdict Questions 9 through 12, made in Court on October 3, 1988, prior to the submission of those questions to the jury, appear in the Appendix hereto at A-1. The Opinion and Order of the District Court, dated October 21, 1988, after the jury answered the Special Verdict Questions, which "reframes" a question and then answers the "reframed" question, appears in the Appendix hereto at A-10. The judgment entered October 21, 1988 pursuant to that Opinion appears in

the Appendix hereto at A-18. The orders of the District Court dated January 6, 1989 and January 10, 1989, denying a motion for reconsideration of its October 21, 1988 Opinion, appear in the Appendix hereto at A-19, 20. The Order of the District Court dated January 11, 1989 denying a motion for judgment notwithstanding the verdict appears in the Appendix hereto at A-21. The final judgment of the District Court dated January 18, 1989, appears in the Appendix hereto at A-27.

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit, dated August 4, 1989, affirming the opinion and final judgment of the District Court, appears in the Appendix hereto at A-28.

None of the opinions or orders is reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming the final judgment of the District Court, was entered on August 4, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *The Seventh Amendment provides*:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. *Rule 49(a), Fed. R. Civ. Proc. provides, in pertinent part (emphasis added)*:

(a) *Special Verdicts*. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.

* * *

The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court *omits any issue of fact* raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATEMENT OF THE CASE

On September 6, 1985, Respondent-Plaintiff, John Hitesman, injured the middle finger of his right hand while cleaning a volumetric feeder on a Funyon® snack food production line at the Williamsport, Pennsylvania, plant of Frito-Lay, Inc. ("Frito-Lay").

On September 4, 1987, invoking the diversity jurisdiction of the District Court, Hitesman commenced this case against Petitioner-Defendant, Acrison, Inc., alleging that the volumetric feeder, which Acrison allegedly sold, was defective for lack of an interlocked guard.

Acrison asserted, as a defense, that it was not responsible for the lack of an interlocked guard, because (1) all feeders sold by Acrison to Frito-Lay required additional parts to be operational, and were incomplete products when sold, (2) Acrison did not know of the intended use of the feeders, and therefore could not determine either the nature or location of safety devices, which would vary according to the intended use, and (3) Frito-Lay, which would complete the product and determine its intended use, had responsibility for installing safety devices.

The trial was bifurcated into liability and damage phases, each tried before the same jury.

After the close of the evidence on liability, the District Court submitted special verdict questions to the jury, which the jury answered.

The jury answered, in Acrison's favor, each of the special verdict questions on liability relating to the component-part issue, that is, whether the feeder was a completed product, and whether Acrison, or Frito-Lay, was responsible for installing safety devices. However, the District Court refused to enter judgment in Acrison's favor in accordance with the jury's special verdicts. Instead, the District Court disregarded the special verdict questions that had been briefed and argued before their submission to the jury, "reframed" a question the jury had answered, held that the parties had waived a jury trial on that question, answered the "reframed" question itself against Acrison, and entered judgment in Hitesman's favor. (A-14-15) The Court of Appeals held that such "reframing" of the special verdict question was permitted by Rule 49(a), *Fed. R. Civ. Proc.*, and affirmed. (A-34-35)

* * *

To establish Acrison's liability, Hitesman had the burden of proving that (1) the feeder was a completed product when it left Acrison, (2) the absence of an interlocked guard made the feeder dangerously defective, and (3) it was Acrison's responsibility to install the interlocked guard.

The component-part issue focused on the first and third aspects of Hitesman's proof: Was the unit a completed product, so that Acrison was responsible for installing the interlocked guard, or an incomplete product so that it became the responsibility of Frito-Lay to install the interlocked guard?

A volumetric feeder is a multi-purpose unit that can be placed in thousands of different production lines. A volumetric feeder consists of a number of pieces of fabricated metal, which make up a supply hopper and product dispenser, and various electrical components, such as wiring, switches, rheostats, a control panel, and a motor, which complete the feeder and power

it. Acrison sells the fabricated metal portion, which is inoperable when sold. Another party (usually the end-user) completes the feeder by adding automatic or manual switches, electrical connections to other equipment on a production line, and a control panel. The end user also determines the use of the feeder, and having determined the use, also determines the nature and location of appropriate safety devices, such as grids and interlocked guards.

Frito-Lay designed and supplied the electrical parts of the unit, adding substantial pieces of electrical equipment and mountings to the inoperative unit so that it would be operational. Frito-Lay designed, manufactured, and installed a grid without an interlock within the upper hopper. Frito-Lay installed the hard wiring from the power source to the motor of the feeder. Frito-Lay put on a motor. Frito-Lay designed, manufactured, and installed the control panel, which included the on-off switch, and the rheostats, which controlled the speed at which the feeder operated. Frito-Lay designed and installed each electrical interconnection between the fabricated metal portions of the feeder and the other equipment on the Funyon® production line.

The jury answered the threshhold special verdict question on the component-part issue in Acrison's favor:

> 9. *Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part* of a production system *to be completed by the addition of other machinery* by Frito-Lay?
>
> *YES.*

(emphasis added).

Having found that the feeder was merely "a component part," which was "to be completed by the addition of other machinery by Frito-Lay," the jury went on to determine the facts relevant to whether Acrison or Frito-Lay was responsible for installing safety devices. The jury answered each special verdict question in Acrison's favor:

10. Is Frito-Lay, as the designer and manufacturer of the production line in which a volumetric feeder is to be installed, better able than Acrison to determine the location and type of safety devices for any volumetric feeder that is installed in Frito-Lay's production line?

YES.

11. Is it the custom for Frito-Lay, as the designer and manufacturer of a production line in which a volumetric feeder is to be installed, to determine the location and type of safety devices to be used with the volumetric feeder and to incorporate those safety devices within the production line?

YES.

12. Is it more feasible for Frito-Lay, as the designer and manufacturer of a production line in which a volumetric feeder is to be installed, to incorporate safety devices in the volumetric feeder at the time of the installation of the volumetric feeder in the production line than it is for Acrison to incorporate safety devices in the volumetric feeder at the time of the manufacture of the volumetric feeder?

EVIDENCE EQUALLY BALANCED.[1]

The jury thus absolved Acrison of liability.

On October 21, 1988, instead of entering judgment in Acrison's favor in accordance with the jury verdict, the District Court held that Question 9 did not properly frame the threshhold component-part issue. The District Court invoked Rule 49(a),

[1] Because Hitesman bore the burden of proof on each issue, the finding "evidence equally balanced" was a finding that Hitesman had not met his burden.

Fed. R. Civ. Proc., and decided to "reframe" that question as follows:

> Was the volumetric feeder, including the hopper, the result of substantial work by more than one party?

(A-14)

Having reframed the factual question already answered by the jury, the District Court went on to answer the reframed question itself, and held that the volumetric feeder was a complete product when it was sold and that Acrison was responsible for the lack of the interlocked guard. (A-15)

Question 9, as submitted to the jury, had been developed through extensive briefing and argument by the parties. (*E.g.*, A-1) When the District Court reframed question 9, the Court changed the question back into a form virtually identical to one earlier proposed by Acrison, which had been modified to accomodate Hitesman's objections.

Question 9, as posed to the jury, was:

> Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?

(A-31)

This question had its genesis in two proposed questions submitted by Acrison, and a similar charge submitted by Hitesman. Acrison's proposed special questions were:

> *Acrison Proposed Question 9.*
>
> Did plaintiff establish that any Acrison volumetric feeder sold to Frito-Lay was expected to reach the ultimate user, *i.e.*, Frito-Lay's production or maintenance personnel, without *substantial changes and additions by Frito-Lay* to the switching and power to the volumetric feeder after it was sold?

(A-1, n.1) (emphasis added).

Acrison Proposed Question 10.

> Are the volumetric feeders sold by Acrison *incomplete products* that are part of production systems *to be completed by the addition of other machinery by Frito-Lay* or others over which Acrison has no control?

Id. (emphasis added).

Hitesman submitted a proposed charge that mirrored Acrison's proposed question 10:

> Acrison alleges that it was not responsible for installing safety devices on the volumetric feeder *because the feeder was an unfinished product when it was sold*, in other words, Defendant contends that the volumetric feeder was merely a component part of a complex production system and that it was not possible for Defendant to provide safety devices. *If you find that the volumetric feeder was a substantially unfinished product or merely a component part*, you must then determine whether Acrison or Frito-Lay had the responsibility for supply the safety devices.

(emphasis added).

Hitesman's proposed charge, which asked whether the volumetric feeder was "substantially unfinished" when sold, thus mirrored Acrison's proposed question 10, which asked whether the feeder was an "incomplete product" when sold.

The Court ruled that Acrison's proposed question 9, which inquired about whether Frito-Lay had made "substantial changes and additions" to the feeder, was redundant with proposed question 10, which asked whether the feeder was an "incomplete product" when sold.

While charging the jury, the District Court read the following special verdict question, derived from Acrison's proposed question 10 and Hitesman's proposed charge:

> Nine: Was the volumetric feeder sold by Acrison to Frito-Lay an *incomplete product* which was a part of a production system *to be completed* by the addition of other machinery by Frito-Lay?

(emphasis added).

After the District Court had charged the jury, Hitesman requested a minor change of language. Hitesman's counsel objected to the inclusion of the phrase "incomplete product" (even though he had earlier suggested the similar phrase "substantially unfinished product"). Hitesman's counsel proposed instead that the jury be asked whether the volumetric feeder was "merely a component part." Acrison concurred. All parties agreed to retain the phrase "to be completed by the addition of other machinery by Frito-Lay," which modified the phrase "component part." The colloquy was as follows:

> THE COURT: I['ve] got to know what you want me to put in this question so we can find out what is wrong if anything with the language that you propose.
>
> MR. HUMPHREY [Hitesman's counsel]: Was the volumetric feeder sold by Acrison to Frito Lay.
>
> THE COURT: To become a part of –
>
> MR. HUMPHREY: *Merely a component part of a production system* and then following it up.
>
> THE COURT: Alright. Well, that may have some merit. I'm worried about the fact that it might – the phrase incomplete product is somewhat troublesome.
>
> MR. FORNARI [Acrison's counsel]: Your Honor?
>
> THE COURT: Yeah, what's your view?

> MR. FORNARI: Perhaps I can – if Mr. Humphrey is suggesting the following language, was the volumetric feeder sold by Acrison to Frito Lay merely a component part of a production system to be completed by the addition of other machinery by Frito Lay, that's acceptable to us.
>
> * * *
>
> THE COURT: Alright, merely a component part of a production system to be completed by the addition of other machinery by Frito Lay.
>
> MR. FORNARI: That's fine.

(A-3-4) (emphasis added).

Special verdict question 9 on the verdict form therefore asked:

> Was the volumetric feeder sold by Acrison to Frito-Lay merely a *component part* of a production system *to be completed* by the addition of other machinery by Frito-Lay?

(A-31) (emphasis added). Neither party requested the District Court to direct the jury's attention to the minor change in language between the oral charge and the written question, and the District Court did not do so.

Thus, when the District Court "reframed" the question answered by the jury, to determine whether the feeder was the result of "substantial work by more than one party," all the District Court did was to change the question back to what it had read when it charged the jury with the similar phrase, "incomplete product." Furthermore, the District Court had earlier ruled that the phrase "incomplete product" made the same factual inquiry as Acrison's proposed question 9, which would have explicitly asked the jury whether Frito-Lay made "substantial changes and additions" to the feeder.

The District Court ordered the entry of judgment in Hitesman's favor on liability. (A-17) The case proceeded to a trial on damages, and judgment was entered in Hitesman's favor. (A-28)

Acrison appealed to the United States Court of Appeals for the Third Circuit.

The Third Circuit acknowledged that the District Court did not supply a "missing question," but instead "reframed" a question which had been submitted to and answered by the jury. (A-31-32, 34) Nevertheless, the Third Circuit decided that such "reframing" of a question was permitted by Rule 49(a), *Fed.R.Civ.Proc.*, and therefore affirmed. (A-35)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider whether the use of Rule 49(a), *Fed. R. Civ. Proc.*, to reframe special verdict questions that were submitted to and answered by the jury, and to have the reframed questions answered instead by the District Court, deprives the party in whose favor the jury ruled of his Seventh Amendment right to trial by jury.

The Third Circuit's approval of the use of Rule 49(a) to *reframe* a factual issue submitted to and resolved by the jury is unwarranted by the language of the Rule, in direct conflict with decisions of other Courts of Appeals, and results in a denial of a Seventh Amendment right to trial by jury.

Rule 49(a), by its terms, addresses a narrow issue: What should a district court do when special verdict questions "omit" a factual issue raised by the pleadings, and therefore the jury's answers to special verdict questions leave an issue unresolved?

Rule 49(a) recognizes that it would be a waste of judicial resources to conduct a new trial on the omitted issue, and therefore provides that: (1) a district court may make a finding on the omitted issue (and, implicitly, must make a finding

if a verdict cannot be reached without the resolution of that issue) or (2) a district court may ignore the omitted issue if a verdict can be reached without its determination, in which event, the district court is deemed to have made a finding consistent with the verdict.

Rule 49(a) provides that a party's failure to demand the submission of a special verdict question on the omitted issue constitutes a waiver of trial by jury on that issue.

Rule 49(a), by its terms, does not the allow the trial judge to reframe a question that was submitted to and answered by the jury. Instead, the Rule is limited to cases where the special verdict questions "omit[] any issue of fact," and allows the district judge only to ask and answer the "omitted" question.

In this case, the Third Circuit acknowledged that the District Court did not merely supply an "omitted" question, but instead "reframed" a question which had been asked. The Third Circuit thus stated:

> After receiving the liability jury's answers to the special verdict questions, the district court held that question number 9 *did not properly frame* the factual issue of whether the component part defense applied to this case. *Id.* at A-1301. Instead, the district court held that the jury should have been asked the question:
>
> > Was the volumetric feeder, including the hopper, the result of substantial work by more than one party?
>
> *Id.* Thereupon, acting pursuant to Federal Rule of Civil Procedure 49(a), the district court *reframed the factual issue*, held that each party had waived a jury trial on it, and answered it adversely to Acrison by finding that the volumetric feeder was a complete product when Acrison sold it and that Acrison was therefore responsible for the lack of a guard.

(A-31-32) (emphasis added).

There is a critical difference between supplying and answering an "omitted" question, which Rule 49(a) authorizes, and "reframing" a question, which is what was done below.

When a question is omitted, no factual determination on the subject matter has been made by the jury. When, as in this case, a question is submitted to the jury, and answered by the jury, and then the question is "reframed," the jury has made a factual determination that is then set aside without regard to whether the jury's factual determination was supported by substantial evidence.

No other Circuit has countenanced the use of Rule 49(a) to allow a district judge to reframe a question on an issue of fact submitted to the jury. Instead, the Circuits employ Rule 49(a) for its more limited, intended purpose.

For example, the *First Circuit*, in *Goeken* v. *Kay*, 751 F.2d 469, 474 (1st Cir. 1985), held that, when the jury in its answers to special verdict questions determined that the parties had reached an oral contract, but the special verdict omitted questions necessary to determine the validity of a statute of frauds defense, Rule 49(a) permitted the District Court to pose and answer the omitted questions to resolve the statute of frauds defense.

The *Second Circuit*, in *Cullen* v. *Margiotta*, 811 F.2d 698, 731 (2d Cir. 1987), held that, after a jury found, by answering special verdict questions, the existence of an enterprise under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982), but the special verdict omitted questions on whether certain defendants participated in that enterprise, the District Court was permitted, under Rule 49(a), to make findings as to whether those defendants participated.

The *Fourth Circuit*, in *Langenderfer* v. *Midrex Corp.*, 660 F.2d 523, 526 (4th Cir. 1981), held that, when special verdict questions propounded to a jury in a contract case omitted the issue of whether the defendant's conduct equitably estopped it from denying the existence of a cost-of-living provision, the

District Court could properly make findings on the omitted issue under Rule 49(a).

The *Fifth Circuit*, in *Harmon* v. *Grande Tire Co.*, 821 F.2d 252, 255 (5th Cir. 1987), held that, when special verdict questions omitted the issue of whether the defendants had complied with a particular section of motor carrier safety regulations, the District Court properly made that determination under Rule 49(a). *See also Brenham* v. *Southern Pacific Co.*, 328 F. Supp. 119, 123 (W.D. La. 1971), *aff'd mem.*, 469 F.2d 1095 (5th Cir.) (approving a District Court's reliance upon Rule 49(a) when a jury, by answering special verdict questions, found that a defendant was negligent, but the questions omitted the issue of proximate cause, which the District Court then found), *cert. denied*, 409 U.S. 1061 (1972).

The *Tenth Circuit*, in *Fortier* v. *Dona Anna Plaza Partners*, 747 F.2d 1324, 1337 (10th Cir. 1984), held in a contract and negligence case that the District Court properly invoked Rule 49(a) to allocate damages when the special verdict questions did not request the jury to allocate the total amount of damages among the various claims.

The *Federal Circuit*, in *Spectra-Physics, Inc.* v. *Coherent, Inc.*, 827 F.2d 1524, 1535 (Fed. Cir. 1987), held in a patent case that, when a special verdict question was presented to the jury on the best mode contemplated by the inventor for carrying out the invention but the jury was erroneously told that it need not answer that question if it answered a preceding question in a certain way, the "best mode" question was "omitted," and was properly answered by the District Court. The Federal Circuit noted:

> This is the type of inadvertent omission that Rule 49(a), Fed. R. Civ. Proc., remedies by providing that trial by jury has been effectively waived in these circumstances.

Id.

The common thread running through these decisions is that Rule 49(a) authorizes a District Court to answer *inadvertently* "omitted" questions – not to reframe questions on issues already determined by the jury.

In *In re Randall*, 712 F.2d 1275, 1277 (8th Cir. 1983), the *Eighth Circuit* soundly rejected a district court's use of Rule 49(a) to determine issues that had been submitted to the jury. In that product liability case, the district court had directed a verdict in the defendant's favor on the negligence count, and the jury, answering special verdict questions, returned a verdict in the defendant's favor on the strict liability count. After the Court of Appeals had remanded the case with instructions to submit the negligence count to the jury, the defendant moved for summary judgment before the district court, which then made a finding under Rule 49(a) that the defendant's conduct was not the proximate cause of the plaintiff's injuries. Based on that finding, the district court entered judgment in the defendant's favor on the negligence count. The Court of Appeals reversed and remanded the case again for a plenary trial on the negligence count:

> Under Rule 49(a), a trial judge may not make a special finding unless it has been omitted by the court in its original submission of the special verdict to the jury. In this case, *it is clear that the issue of proximate cause was instructed upon and submitted to the jury in the original trial.*
>
> • • •
>
> The issue originally submitted to the jury was under the strict liability count. We find it erroneous to say that the parties had waived their right to a jury trial on the issue of proximate cause under the negligence count.

Id. (emphasis added).

As the *Fifth Circuit* stated in *Guidry* v. *Kem Manufacturing Co.*:

> Under Rule 49(a) a trial judge cannot resolve those issues of fact that were submitted.

604 F.2d 320, 321 (5th Cir.), *cert. denied*, 445 U.S. 929 (1979).

The jury-waiver clause of Rule 49(a) is premised on the narrow scope of the Rule: By failing to demand submission of an "omitted" question, a party, *through his own conduct*, thereby waives his right to trial by jury on that question.

This rationale of the waiver, set forth in the Rule itself, does not hold if a district court is allowed to reframe questions already submitted to and answered by the jury. In that situation, neither party has engaged in any act forming the basis of a waiver. Acrison did not waive its right to a jury trial by failing to demand the submission of an omitted question, because there were no omitted questions. To the contrary, when the District Court "reframed" a question that had been submitted, all the District Court did was change the question back to the form originally proposed by Acrison. And, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937).

The conclusion that the use of Rule 49(a) was improper does not depend on whether the special questions, as answered by the jury, correctly framed the component part issue under *Verge* v. *Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978). If the special verdict questions, which absolved Acrison of liability, had misstated the law, and if Hitesman had objected to those questions,[2] the remedy would have been to declare a mistrial and conduct a new jury trial — not to have a verdict by the District

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[2] Hitesman did not object. He agreed that, if any special questions were to be submitted on the component-part issue, they should be in the form which was used. Indeed, the specific language in the threshold special verdict question, later held improper by the District Court, was suggested by Hitesman.

Court. That is the same remedy applied when a judge incorrectly charges the jury on the law preceding a general verdict. *Petree* v. *Victor Fluid Power, Inc.*, 831 F.2d 1191, 1198 (3d Cir. 1987). Under no circumstances, after an erroneous jury charge, whether resulting in a special verdict or a general verdict, can a judge simply decide that he might as well decide the case himself to avoid a new trial.

This Court should grant certiorari to determine whether the District Court's use of Rule 49(a) to reframe an issue already determined by the jury constituted an improper invasion of the jury's role – an important question of federal law, justifying the grant of certiorari, particularly in light of the conflict among the Circuits. As this Court held in *Rogers* v. *Missouri Pacific Railroad Co.*:

> Cognizant of the duty to effectuate... the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

352 U.S. 500, 509 (1957). *See also Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110 (1959).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be *granted*.

Dated: New York, New York
November 1, 1989

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN,	:	
	:	
Plaintiff,	:	
	:	Civil No. 87-1255
	:	
vs.	:	
	:	(JUDGE MUIR)
ACRISON, INC.,	:	
	:	
Defendant.	:	

October 3, 1988

RULINGS UPON REQUESTS
FOR SPECIAL VERDICT QUESTIONS
(A955 - A966)

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* * *

MR. HUMPHREY [Plaintiff's Counsel]: And I object to the inclusion of questions nine through twelve.[1] If in fact those

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[1] Special Verdict Questions 9 through 12, as requested by defendant, were as follows:

9. Did plaintiff establish that any Acrison volumetric feeder sold to Frito-Lay was expected to reach the ultimate user, *i.e.*, Frito-Lay's production or maintenance personnel, without substantial changes and additions by Frito-Lay to the switching and power to the volumetric feeder after it was sold?

10. Are the volumetric feeders sold by Acrison incomplete products that are part of production systems to be completed by the addition of other machinery by Frito-Lay or others over which Acrison has no control?

(Footnote continued)

questions are to be given and I assume at this point that they are, I feel that there should be additional definition as to what is an incomplete product. I don't think – at least I did not gather from the charge instructions as to what they are to take into consideration in determining whether a product is complete – an incomplete product or a complete product. I think it need not be totally complete.

THE COURT: Well, let's take these up one at a time. Do you object to the questions nine through twelve which are based upon the *Virge* case? What's your view about that, Mr. Fornari?

MR. HUMPHREY: Could I add something to my – well, the question, I object to all of those questions.

THE COURT: I understand.

MR. HUMPHREY: Okay. If those are to be given, there are problems with specific questions in addition to my general objection. Do you want to hear those now or just –

THE COURT: No, I want to find out whether Mr. Fornari thinks we should give nine through twelve.

MR. FORNARI [DEFENDANT'S COUNSEL]: Your Honor, I think we should give nine through twelve. I think that we've argued the component parts defense since the beginning of this case, it is one of our defenses and I think that instructions nine through twelve adequately set forth and properly set forth the

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11. Does Frito-Lay purchase volumetric feeders as component parts for installation in production lines, then determine the location and type of safety devices to be used with the volumetric feeder and incorporate those safety devices within the production lines?

12. Is Frito-Lay, as the designer and manufacturer of the production line in which a volumetric feeder is to be installed, better able than Acrison to determine the location and type of safety devices for any volumetric feeder that is installed in Frito-Lay's production line?

law. If the Jury finds in nine that it was as you say no, there was not an incomplete product, then they come back into Court and it's all over, the component parts defense did not prevail. If in fact they find that it was [an in]complete product they then go through and answer the remaining three questions which are the criteria set forth by the Third Circuit and as adopted in this state as *Virge* and if they answer yes, yes, yes, yes to nine through twelve then we go home.

THE COURT: Well, I think that under that case we're obliged to give these questions so we're going to overrule that general objection.

MR. FORNARI: Thank you, Judge.

THE COURT: Now, what's wrong with any of these particular questions as to language?

MR. HUMPHREY: Okay. Question number nine, as read, I cannot see how they can answer other than yes.

THE COURT: Well, then you're going –

MR. HUMPHREY: Because first it says is it an incomplete product? Well, there's no dispute but that the product was shipped without wiring coming into it and controls. Just in terms of using the – a phrase incomplete product I think the Jury would say yes – it's an incomplete product and, of course, yes, it was a part of a production system to be completed by the –

THE COURT: Well, how do you think it should be changed?

MR. HUMPHREY: The test, as I understand it, is –

THE COURT: I'm not asking you what the test is, Mr. Humphrey, I got to know what you want me to put in this question so we can find out what is wrong if anything with the language that you propose.

MR. HUMPHREY: Was the volumetric feeder sold by Acrison to Frito Lay.

THE COURT: To become a part of –

MR. HUMPHREY: Merely a component part of a production system and then following it up.

THE COURT: Alright. Well, that may have some merit. I'm worried about the fact that it might – the phrase incomplete product is somewhat troublesome.

MR. FORNARI: Your Honor?

THE COURT: Yeah, what's your view?

MR. FORNARI: Perhaps I can – if Mr. Humphrey is suggesting the following language, was the volumetric feeder sold by Acrison to Frito Lay merely a component part of a production system to be completed by the addition of other machinery by Frito Lay, that's acceptable to us.

THE COURT: Alright. Now, let me see if I can get this in here.

MR. FORNARI: Your Honor, if you strike –

THE COURT: Here, I know what to do, I've got –

MR. FORNARI: I'm sorry.

THE COURT: Alright, merely a component part of a production system to be completed by the addition of other machinery by Frito Lay.

MR. FORNARI: That's fine.

THE COURT: Alright. Now, this one's got to be changed, Mrs. Lehotsky.

CLERK OF COURT: Yes, Judge.

THE COURT: And we've got so many drafts running around here and I am very much concerned that we'll send out the wrong one. This is a change at 10:58 A.M., alright. Number nine.

Now, what's another one that you think should be changed, Mr. Humphrey?

MR. HUMPHREY: I belive that in question ten the concentrating on Frito Lay is an improper application of the *Virge* principles if we're to assume that they are controlling. I don't think the question is what a particular user of the product is better able or not better able to do. I think that the question is what generally the user is better or better able to do.

THE COURT: How do you think this should be changed?

MR. HUMPHREY: Is an entity –

THE COURT: Is what?

MR. HUMPHREY: An entity.

THE COURT: Well, why can't we use names in this? These people are going to have trouble enough with these questions without getting into legalistic or legal concepts.

MR. HUMPHREY: Well, Your Honor, that's my point is that to use the name Frito Lay, then ask the Jury to look just at the relationship between Acrison and Frito Lay when we're dealing with a – in my view when we're dealing with a component parts defense the question is whether or not the user is – I mean, the manufacturer is permitted to shift the burden of putting on safety devices to an ultimate user or consumer becuase he's shipping it in an unfinished state. What the particular practice at Frito Lay is or what they're better able to do because they have an engineering department as opposed to some other company which does not have an engineering department is not what the law asks us to focus on. We're looking at it from a standpoint of the manufacturer.

THE COURT: Alright. You tell me what the language is and I'll take it down.

MR. HUMPHREY: Is the customer who owns the production line in which a volumetric feeder, et cetera, go on from there.

THE COURT: On which a volumetric feeder is to be installed better able than Acrison to determine the location and type of safety devices for any volumetric feeder that is installed in Frito Lay's production line?

MR. HUMPHREY: In the customer's production line.

THE COURT: What's your view about that, Mr. –

MR. FORNARI: Let me first say that I don't want Mr. Humphrey to walk us into reversible error and I have serious questions in my mind if we get into these general statements of a customer whether we're walking into a trade custom, which if there is then a defendant's verdict on this we're going to be up on appeal because we've walked into reversible error. Secondly, and I think it's most important that what is at issue here is whether Frito Lay is the design – as the designer and manufacturer is better able. We're not talking about a theoretical entity and I think in a theoretical sense you can't argue a components parts defense on a theoretical basis. The *Virge* case and the cases that follow it in this jurisdiction talk about the relative expertise between the entity that – to whom it is sold and the entity that is selling it and I think that to just say the customer who owns the production line gets us away from that concept. If the customer just owns it he may have had an engineering firm who designed it and manufactured it. The question of who owns it is not entirely the relevant criteria. I think Your Honor has properly taken the case language in both ten, eleven and twelve which is is Frito Lay as the designer and manufacturer, et cetera, and to just turn it into the customer is irrelevant at least in this case.

THE COURT: Alright, we'll overrule the objection –

MR. FORNARI: Thank you, Your Honor.

THE COURT: – and deny the request to change number ten. What's your next one?

MR. HUMPHREY: I object to question number eleven; again for the same reason in that it highlights Frito Lay and I think if it's to be used should be more general.

THE COURT: So you want to change it to is it more feasible for a customer as the designer and manufacturer of a production line, is that correct.

MR. FORNARI: Your Honor, is –

THE COURT: Now, wait a minute, I'm asking Mr. Humphrey.

MR. HUMPHREY: Number eleven, I think, is improper under any circumstances because I think custom in the trade whether it's generally or whether it's Frito Lay's custom has been thrown out by the *Majeke* Court.

THE COURT: Well –

MR. FORNARI: Your Honor, in that regard –

THE COURT: I don't even know which one we're working on.

MR. FORNARI: Eleven, Your Honor.

THE COURT: Alright. Yeah?

MR. FORNARI: I agree with Mr. Humphrey that it should read is it the custom for Frito Lay.

THE COURT: Alright, we'll take that out.

MR. FORNARI: And take out the words in the trade.

THE COURT: Okay.

MR. HUMPHREY: I, of course, disagree with that too, Your Honor.

THE COURT: Well, I can't tell whether you want in the trade taken out or whether you don't want it taken out or don't you care?

MR. HUMPHREY: Your Honor, I don't want the question under any circumstances.

THE COURT: I understand that, but we're going to send this question out. Now, do you want me to take out the words in the trade or not?

MR. HUMPHREY: No.

THE COURT: Alright. Well, you think—

MR. FORNARI: Your Honor, I think if you leave the words in the trade in you're walking right into the—

THE COURT: I understand, we've already charged them twice now on this in the trade deal.

MR. FORNARI: And you've taken out the word in the trade.

THE COURT: Yeah.

MR. FORNARI: So I think that the Jury instruction to be consistent should remove the words in the trade.

MR. HUMPHREY: Your Honor, I don't want to be accused of walking anybody into reversible error so I will say I don't care what goes out on this question. I'll let Mr. Fornari put in what he wants in.

THE COURT: I understand, but we're just not getting anywhere here. Just a second. (PAUSE) Well, we'll take out the words in the trade and we'll send it out. Now, the law clerks, you've got to make some notes here as to what we're doing also, so to take out in the trade so we're sure we got it right. Alright. Now, what about number twelve?

MR. HUMPHREY: I object to the question generally and also to the directing their attention to Frito Lay. I really think it's improper to concentrate on the particular customer involved because this customer with an engineering department may

have capabilities that some other customer doesn't and I don't think that even the *Virge* Court is looking – asking the manufacturer to determine exactly what the engineering capabilities of its customers are, so I think if you're going to give it I would say is it more feasible for a customer.

THE COURT: Alright. What's your view?

MR. FORNARI: Your Honor, same argument that I made before.

THE COURT: Well, do you want the word Frito Lay kept?

MR. FORNARI: Yes, Your Honor.

THE COURT: And you object to the change to customer, is that right?

MR. FORNARI: Yes, Your Honor, on the same ground as before.

THE COURT: We'll leave it alone the way it is. Now, we've got to get these retyped and we'll take a recess. I don't know how long we'll take.

MR. HUMPHREY: How long, Your Honor?

THE COURT: I said I don't know how long we'll take. At least ten minutes because we have got to get it straightened out.

MR. FORNARI: Thank you, Judge.

CLERK OF COURT: Court is now in recess.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN, :

Plaintiff : Civil No. 87-1255

vs. :

(Judge Muir)

ACRISON, INC., :

FILED

Defendant : Oct. 21, 1988

Donald R. Berry, Clerk

Per .....pe.....

Deputy Clerk

OPINION

MUIR, District Judge.

I. Introduction.

The sole issue before the Court is in whose favor judgment should be entered on the special verdict returned by the jury in the liability phase of this case. That in part turns on whether the jury's finding on a special verdict question that a machine was a component part of a production system satisfactorily establishes the availability of the so-called "component parts" defense. John Hitesman filed his brief on this issue on October 13, 1988. Acrison, Inc. filed its brief on October 14, 1988. An answering brief was filed by Acrison, Inc. on October 18, 1988, and by John Hitesman on October 19, 1988, at which time this issue became ripe for our decision.

II. Findings of Fact.

The Plaintiff, John Hitesman, was an employee of Frito-Lay, Inc. at its plant in Williamsport, Pennsylvania. Hitesman's duties included cleaning the volumetric feeders used by Frito-Lay to add seasoning to food products. As a result of routine use of the volumetric feeder, seasoning builds up on the drive, or auger mechanism, of the machine and necessitates periodic cleaning. On September 6, 1985, Hitesman was cleaning one of the

volumetric feeders at Frito-Lay. While doing so, Hitesman noticed some hardened seasoning that had accumulated on the drive mechanism of the machine. He attempted to remove the hardened seasoning with his hand which was then caught by the rotating auger mechanism of the machine, causing him injury.

Hitesman filed suit against Acrison, Inc., a New Jersey corporation that manufactures volumetric feeders. Hitesman's sole theory is based on products liability. Hitesman claims that Acrison manufactured and sold the volumetric feeder, including the hopper chamber, to his employer, Frito-Lay, and that the feeder and hopper chamber were defective because they lacked adequate safety devices and warnings. Specifically, Hitesman claimed that the hopper chamber was defective because it lacked an interlocked guard over the hopper which would cause the machine to stop when the guard was opened.

The trial was bifurcated into liability and damages phases. The liability phase was tried to a jury, and the jury answered special verdict questions which were submitted to it. The special verdict questions and the jury's answers to them which are relevant to our inquiry are as follows:

> 1. Did Defendant Acrison, Inc. sell the volumetric feeder involved in the injuries to Plaintiff John Hitesman?
>
> Answer: Yes.
>
> 2. Was the volumetric feeder at issue in this case defective at the time it left Acrison's control because it lacked an interlocked guard?
>
> Answer: Yes.
>
> 3. If your answer to the previous question is "yes," was the absence of an interlocked guard a substantial factor in bringing about and actually causing John Hitesman's injuries?

Answer: Yes.

9. Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?

Answer: Yes.

Acrison argues that the jury's answer to special verdict question No. 9 satisfactorily establishes the availability of the component parts defense in this case. Acrison maintains that the appropriate focus is on whether the volumetric feeder sold by Acrison to Frito-Lay was a component in any one of several complex production systems which Acrison did not design. (Defendant's Post Trial Brief, at 5). Hitesman argues, however, that a production line is not the product and that the component parts defense only applies in a case where the defective product was manufactured with the substantial contributions of more than one party. (Plaintiff's Brief on Defendant's Liability as Established by the Jury Verdict, at 12).

III. Discussion.

At the outset we note that the laws of Pennsylvania control to the extent that they apply to this diversity action. The Defendants have based their component parts defense upon the decision by the Court of Appeals for the Third Circuit in Verge vs. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978). In *Verge*, the Court, discussing the component parts defense, stated that when more than one company is responsible for designing or manufacturing a completed product, two primary issues are involved: (1) Was there a defect? and (2) If so, who is responsible for it? *Id.* at 386. If there is a defect, the determination of responsibility turns first upon whether "the finished product is the result of substantial work by more than one party." *Id.* If it is, then the jury may consider trade custom, the relative expertise of the parties, and the stages of the production process at which it is most feasible to install safety devices. *Id.* at 387.

In the case before us, the jury's response to special verdict question No. 2 clearly indicates that the volumetric feeder was defective at the time it left Acrison's control because it lacked an interlocked guard. In order to decide that someone other than Acrison was responsible for installing safety devices on the volumetric feeder, the jury would first have to decide whether "the finished product is the result of substantial work by more than one party." *Verge*, 581 F.2d at 386; *see* Powell vs. E.W. Bliss Co., 529 F.Supp. 48, 52 (E.D. Pa. 1981) (applying *Verge* standards only after finding considerable evidence that two manufacturers made substantial contributions to finished product). This inquiry, however, begs the question of what constitutes a "finished product." As the Court noted in Wenrick vs. Schloemann-Siemag Aktiengesellschaft, 522 A.2d 52, 55 (Pa. Super. 1987), the central question in our legal analysis of this case is the definition of the product and the defect in the product which gave rise to the Plaintiff's strict liability theory.

We find the Pennsylvania Superior Court's discussion in *Wenrick*, *supra*, to be helpful in deciding the case before us. In *Wenrick*, the Plaintiff was crushed to death by a component of a large extrusion press which was activated when a fellow worker accidentally tripped an unguarded lever of an electrical limit switch. *Wenrick*, 522 A.2d at 53. The Court found that the defective product was the press as a whole and the defect in that product was an unguarded limit switch positioned by a staircase where the switch could easily be inadvertently tripped. *Id.* at 55. Two companies were responsible for the completed press in *Wenrick*: Eaton Corporation ("Eaton") and Schleomann-Siemag Aktiengesellschaft ("SMS"). Eaton designed and manufactured the electrical system to power the press, but its design and manufacture did not include the limit switch or its positioning. *Id.* SMS designed, manufactured, and installed the press. *Id.* at 56. SMS obtained the unguarded limit switch from a third party and installed it. SMS, not Eaton, designed and built the portion of the press where the switch was placed, determined exactly where the switch would be, and designed the pit beneath the press. *Id.* at 56. The Court in *Wenrick* found that Eaton was the designer and manufacturer of the component

part of the finished product, and that there was no evidence that the component part that Eaton designed and manufactured (the electrical wiring system) was defective when it left Eaton's hands.

Like the Court in *Wenrick*, we must focus our inquiry on the definition of the product and the defect in the product which gave rise to Hitesman's strict liability theory. In its answer to special verdict question No. 2, the jury found that the volumetric feeder at issue in this case was defective at the time it left Acrison's control because it lacked an interlocked guard. In its answer to special verdict question No. 3, the jury found that the lack of an interlocked guard was a substantial factor in bringing about and actually causing John Hitesman's injuries. Accordingly, the defective condition of the volumetric feeder was unaffected by Frito-Lay's incorporation of the volumetric feeder into a production line. Unlike the unguarded limit switch installed by SMS in *Wenrick*, *supra*, Frito-Lay did not make or install the volumetric feeder on which John Hitesman was injured. Also, unlike the electrical wiring system made by Eaton in *Wenrick*, *supra*, the volumetric feeder in the case before us *was* defective when it left Acrison's control. The incorporation of the volumetric feeder by Frito-Lay into the production line in no way altered the definition of the product or the defect in the product on which Hitesman bases his strict liability theory. The proper focus of our inquiry in this case should be on the volumetric feeder itself and not on the production system of which the volumetric feeder was a part.

The component parts defense will not apply when the defective product was sold in a finished state. Heckman vs. Federal Press Co., 587 F.2d 612, 617 (3d Cir. 1978). The defective product in this case was the volumetric feeder – not the entire production line which includes other machines that were hooked up to the volumetric feeder. Special verdict question No. 9 misses the point. The proper inquiry, for the purposes of the component parts defense, should have been on the volumetric feeder alone. The jury should have been asked the question

> Was the volumetric feeder, including the hopper, the result of substantial work by more than one party?

Neither Acrison, nor John Hitesman, proposed such a special verdict question.

Acrison proposed special verdict question No. 9 based on the *Verge* case. Plaintiff's counsel took the position that special verdict question No. 9, as well as subsequent special verdict questions based on the *Verge* case should not have been asked. He did not propose an alternative question, however, or questions going to the *Verge* issue, although he was obliged to do so by the last sentence of ¶ 5.83 of the amended practice order shown on page 8 of our September trial list order of August 15, 1988. He should have proposed the above question and a question on the subsidiary issue discussed below.

Because this issue of fact was omitted from the special verdict questions, each party has waived a right to a trial by jury on it. Fed.R.Civ.P. 49(a). We find that the volumetric feeder, including the hopper, was not the product of substantial work by more than one party. The volumetric feeder was complete when it was sold by Acrison and it was defective because it lacked adequate safety devices. Accordingly, the component parts defense does not apply to this case.

Were we to find that the volumetric feeder sold by Acrison was in fact a component part, we would need to address the further question of whether it was substantially changed after it left the hands of the manufacturer. Wenrick vs. Schloeman-Siemag Aktiengesellschaft, 522 A.2d 52, 57 (Pa. Super. 1987) (citing Burbage vs. Boiler Engineering & Supply Co., Inc., 249 A.2d 563, 566 (Pa. 1969)). This issue was also omitted by the parties, and they have waived their right to a jury trial on it as well. Fed.R.Civ.P. 49(a). We find that the volumetric feeder sold by Acrison was not substantially changed when it left Acrison's control. As the jury found by way of its answers to special verdict questions Nos 1, 2, and 3, Acrison sold the volumetric feeder, it was defective after it left Acrison's control, and the defect was a substantial factor in causing John Hitesman's injuries. Accordingly, even if the volumetric feeder was a component part of some larger system, Acrison is still liable for selling a defective product.

So that there will be no question as to what facts we find, we make the following

Findings of Fact.

1. The volumetric feeder was not the product of substantial work by more than one party.

2. The volumetric feeder was not substantially changed after it left Acrison's control.

We reach the following

Conclusions of Law.

1. The Plaintiff, John Hitesman, is entitled to judgment against Acrison on the liability issue.

2. As to any issue of fact relating to liability, the submission of which was not demanded by a party and which has not been found by us above, the Court, in accordance with Fed.R.Civ.P. 49(a), shall be deemed to have made the appropriate finding in accord with the judgment on the special verdict entered in favor of the Plaintiff, John Hitesman, and against the Defendant, Acrison, Inc.

An appropriate order will be entered.

/s/ Muir

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN,	:	
Plaintiff	:	Civil No. 87-1255
vs.	:	(Judge Muir)
ACRISON, INC.,	:	
Defendant	:	

FILED
Oct. 21, 1988
Donald R. Berry, Clerk
Per .....pe.....
Deputy Clerk

ORDER

In accordance with the opinion filed this day,

1. The Clerk shall enter judgment on the special verdict in favor of the Plaintiff.

2. The Clerk shall notify counsel forthwith of the provisions of this order.

/s/ Muir

MUIR, U.S. District Judge

DATED: October 21, 1988

MM:rw

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN JUDGMENT IN A CIVIL CASE

v.

ACRISON, INC.

CASE NUMER: CV. 87-1255

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict, and a decision on the verdict has been rendered this date by the Court.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Plaintiff and against the Defendant Acrison, Inc. on the special verdict questions filed October 5, 1988.

October 21, 1988 DONALD R. BERRY

Date *Clerk*

FILED
Oct. 21, 1988
Donald R. Berry, Clerk
Per .....pe.....
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN, :

Plaintiff : Civil No. 87-1255

vs. : (Judge Muir)

ACRISON, INC., :

Defendant :

FILED
January 6, 1989
Donald R. Berry, Clerk
Per .....pe.....
Deputy Clerk

ORDER

January 6, 1989

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 31, 1988, the Defendant, Acrison, Inc., filed a motion for reconsideration of this Court's opinion and order of October 21, 1988, or, in the alternative, for an amendment of the findings contained in our opinion and order of October 21, 1988. On November 30, 1988, Acrison filed its brief in support of its motion. On December 21, 1988, the Plaintiff, John Hitesman, filed his brief in opposition to Acrison's motion. No reply brief has been filed, and the time for filing such reply brief has now passed. This motion is now ripe for our disposition.

Our order of October 21, 1988, concerned the applicability of the so-called component parts defense raised by Acrison during a jury trial before this Court. In our opinion and order, we held that the component parts defense raised by Acrison did not apply in this case because Acrison failed to meet its burden of proof which required it to show that the volumetric feeder which caused Hitesman's injury was the product of substantial work by more than one party. Acrison has asked us to amend our opinion and order and rule that the volumetric feeder that injured John Hitesman was in fact the product of substantial work by more than one party. Upon making this proposed ruling, Acrison urges us to enter judgment in its favor.

We have reviewed our opinion and order of October 21, 1988. We find no error in that opinion and order, and we will stand by it. Accordingly, we will deny Acrison's motion.

NOW, THEREFORE, IT IS ORDERED THAT:

Acrison's motion for reconsideration of our opinion and order of October 21, 1988, is denied.

/s/Muir

MUIR, U.S. District Judge

MM:rw

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN, :

Plaintiff : Civil No. 87-1255

vs. : (Judge Muir)

ACRISON, INC., :

Defendant :

FILED
Jan. 10, 1989
Donald R. Berry, Clerk
Per pe
Deputy Clerk

ORDER

January 10, 1989

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

By order dated January 9, 1989, this Court denied the motion of Acrison, Inc., for modification of our order of October 21, 1988, pertaining to Acrison's component parts defense. Also on January 9, 1989, Acrison filed its reply brief in support of its motion. The "Fax" copy of Acrison's reply brief was not received by this Court until approximately 4:45 P.M. and subsequent to the filing of our order. We have taken it upon ourselves sua sponte to reconsider our order of January 9, 1989, in light of Acrison's reply brief. Upon consideration of Acrison's reply brief, we find nothing that causes us to change our view expressed in our opinion of October 21, 1988, and reaffirmed in our order of January 9, 1989.

NOW, THEREFORE, IT IS ORDERED THAT:

Acrison's motions for reconsideration of our opinion and order of October 21, 1988, is denied.

/s/ Muir
MUIR, U.S. District Judge

MM:rw

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HITESMAN, :

Plaintiff : Civil No. 87-1255

vs. : (Judge Muir)

ACRISON, INC., :

Defendant :

FILED
Jan. 11, 1989
Donald R. Berry, Clerk
Per .....pe.....
Deputy Clerk

ORDER

January 11, 1989

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 31, 1988, Defendant Acrison, Inc., filed a motion for judgment notwithstanding the verdict, or in the alternative, for an order granting a new trial. On November 30, 1988, Acrison filed a brief supporting its motion. On December 20, 1988, John Hitesman filed his brief in opposition to Acrison's motion. Acrison filed its reply brief on January 9, 1989. Acrison's motion for judgment notwithstanding the veridct or in the alternative for a new trial is now ripe for disposition.

The above-captioned case was bifurcated into liability and damages phases. On October 5, 1988, the jury returned a verdict in favor of the Plaintiff John Hitesman on the question of liability. On October 25, 1988, the jury returned a verdict in favor of John Hitesman in the amount of $391,676.17 in damages.

Acrison argues that it is entitled to a new trial on liability because the jury's verdict is against the weight of the evidence. At the trial we instructed the jury that:

> In answering the special verdict questions, you should not decide that a particular fact exists simply because a greater number of individuals testified that the fact exists as opposed to a lesser number of individuals who testified that the fact did not exist. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witnesses, and which evidence, appeals to your minds as being the most accurate and otherwise trustworthy.

In this case, John Hitesman had the burden of proving that Acrison manufactured the volumetric feeder that caused his injury, that the volumetric feeder was in substantially the same condition at the time of the injury as when it was manufactured, and that the lack of an interlocked guard made the volumetric feeder unreasonably dangerous for its intended use. At trial, Hitesman presented the testimony of Bobby Johnson, Paul Shadle, Greg Weigle, and Mary Ann Hoffman in support of his contention that Acrison manufactured the volumetric feeder in question, and that it was in substantially the same condition at the time of Hitesman's injury as when it left Acrison's control. Moreover, Hitesman offered the testimony of Martin Maurer to show that the design of the volumetric feeder was unreasonably unsafe for its intended use. We conclude that the evidence presented by John Hitesman was ample to sustain the verdict.

Acrison has also asked us to review the jury's findings on the question of assumption of the risk. The jury found that although Hitesman knew of the danger, the evidence was equally balanced as to whether he voluntarily assumed the risk of injury. Acrison had the burden of proof on this issue and the jury's finding of "evidence equally balanced" on the question of voluntariness clearly means that Acrison failed to meet its burden of proof. There was ample evidence on this point, including the statements of John Hitesman himself, to justify this finding and we see no reason to grant a new trial.

We will deny Acrison's motion for a new trial on the question of liability.

Acrison also argues that it is entitled to a judgment notwithstanding the verdict on liability. In considering a motion for a judgment n.o.v., the Court applies the same standard as in considering a motion for a directed verdict. Neville Chemical Co. vs. Union Carbide Corp., 422 F.2d 1205, 1210 (3d Cir. 1970). The Court must view the evidence in the light most favorable to the party who secured the jury verdict. Thomas vs. E.J. Korvette, Inc., 476 F.2d 471 (3d Cir. 1973). A judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment; when there is conflicting evidence or insufficient evidence to make a one-way verdict proper, judgment n.o.v. should not be granted. *Id.*

In the present case, we cannot say that, considering all the evidence presented to the jury, there is but one reasonable conclusion as to the proper judgment. We are of the view that both parties to this litigation presented evidence sufficient for the jury to decide in favor of either party. Accordingly, we will not substitute our own evaluation of the evidence for that made by the jury. We will deny Acrison's motion for a judgment notwithstanding the verdict.

With respect to the damages phase of the trial, Acrison has not moved for a judgment notwithstanding the verdict, but has put forth two arguments in favor a new trial. First, Acrison argues that a statement by Hitesman's counsel during closing argument concerning the amount of damages was improper. Second, Acrison argues that the amount of damages awarded by the jury to John Hitesman was excessive.

During closing argument, counsel for John Hitesman stated:

> The purpose of the law is to make things right for the parties, to as best the law can make whole a person who has been, in this case, injured by a defective product, to make someone who has been injured into a whole person. Obviously the law can't do that fully. You could give a million dollars and you would not restore John's hand. You could not restore the function to that hand. You would not take away the pain

> and the suffering that he has gone through, so it is difficult to make that translation, but the law asks you to do so.

In support of its argument for a new trial, Acrison cites Stein vs. Mayer, 150 F.Supp. 365, 366 (E.D. Pa. 1957). In *Stein*, counsel for the Plaintiff stated:

> How much would you pay for a neurosis? How much would you pay to be afflicted with a condition that you couldn't hold cups or saucers, something that is going to be permanent? Would you take it for $5,000.00? Would you take it for $50,000.00?

150 F. Supp. at 366. As a result of the remarks of counsel in *Stein*, the trial judge ordered a new trial. *Id.* In its supporting brief, Acrison notes that the judge's decision to award a new trial in *Stein* was based in part upon the judge's subjective belief that the plaintiff had presented a weak case. (Acrison Brief in Support, at 71-72).

Improper remarks of counsel are not grounds for a new trial unless refusal to take such action is inconsistent with substantial justice. Salas by Salas vs. Wang, 846 F.2d 897, 907-08 (3d Cir. 1988). The relevant inquiry is whether statements by counsel were so prejudicial that there is "a reasonable probability" that the verdict was influenced by them. Draper vs. Airco, Inc., 580 F.2d 91, 94, 97 (3d Cir. 1978). Moreover, Fed.R.Civ.P. 61 states that:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or admitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice.

We do not find that the remarks of counsel for John Hitesman were so prejudicial that there is a reasonable probability that the

verdict was influenced by them. We conclude that the remarks of Hitesman's counsel during closing argument were not so prejudicial as to justify a new trial on damages in this case.

Acrison's second basis for requesting a new trial is that the amount of damages awarded by the jury to John Hitesman was excessive. Acrison bases this argument upon other cases in which plaintiffs with severe injuries did not obtain the amount of damages awarded by the jury in this case. We decline Acrison's invitation to compare the damages awarded in this case with those awarded in other cases. A verdict is not excessive unless the size of the verdict shocks the Court's sense of justice. Ammon vs. Arnold Pontiac-GMC, Inc., 522 A.2d 647, 649 (Pa. Super. 1987). We do not find the damages awarded in this case to be excessive or shocking.

NOW, THEREFORE, IT IS ORDERED THAT:

The motion of Acrison, Inc., for a judgment notwithstanding the verdict, or in the alternative, for a new trial, is denied.

/s/ Muir

MUIR, U.S. District Judge

MM:rw

Certified from the record
Date 1/18/89
Donald R. Berry, Clerk
Per B. Poust
Deputy Clerk

United States District Court

MIDDLE DISTRICT OF PENNSLYVANIA

JOHN HITESMAN

JUDGMENT IN A CIVIL CASE

v.

ACRISON, INC.

CASE NUMBER: Civil 87-1255

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.**

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the Plaintiff John Hitesman and against the Defendant Acrison, Inc. in the additional sum of $42,169.38 for delay damages pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure, in accordance with the Order of the Court dated January 18, 1989.

Filed
Jan 18 1989
Donald R. Berry, Clerk
Per bp
Deputy Clerk

January 18, 1989 — **Date**

DONALD R. BERRY — **Clerk**

APPROVED:

/s/ Muir
MUIR, U.S. District Judge

Barbara Poust
(By) Deputy Clerk

United States District Court

MIDDLE DISTRICT OF PENNSLYVANIA

JOHN HITESMAN

v.

ACRISON, INC.

AMENDED
JUDGMENT IN A CIVIL CASE

CASE NUMBER: Civil 87-1255

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its special verdict:

☐ **Decision by Court.** This action came to trail or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in the amount of $391,676.17 in favor of the Plaintiff John Hitesman and against the Defendant Acrison, Inc.

Filed
Williamsport, Pa.
Oct 31, 1988
Donald R. Berry, Clerk
Per bp
Deputy Clerk

October 31, 1988	DONALD R. BERRY
Date	**Clerk**

APPROVED:

/s/ Muir	Barbara Poust
MUIR, U.S. District Judge	(By) Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5092

JOHN HITESMAN and CINDY L. HITESMAN,
Appellees

v.

ACRISON, INC.,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 87-1255)

District Judge: Hon. Malcolm Muir

Submitted Under Third Circuit Rule 12(6)
July 28, 1989

BEFORE: GIBBONS, *Chief Judge*, HUTCHINSON, *Circuit Judge*, and REED, *District Judge**

(Filed Aug 4 1989)

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* Hon. Lowell A. Reed, Jr., District Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

I.

Appellant, Acrison, Inc. (Acrison), appeals a money judgment entered against it on a jury verdict in the damage phase of a bifurcated trial in appellee John Hitesman's (Hitesman) products liability action. Hitesman claimed that Acrison manufactured a defective product. He had injured his hand while cleaning the product, a volumetric feeder without a guard, in the course of his employment. In the liability phase of the trial, Acrison asserted that the volumetric feeder was merely a component part of a production system designed and manufactured by Hitesman's employer, Frito-Lay, and that Frito-Lay, not it, was the party properly responsible for installing a safety guard.[1] On the other hand, Hitesman contended that it was a finished product because Acrison was the only party involved in its design and manufacture and it was complete when it left Acrison's plant.

The volumetric feeder was part of a production line that Hitesman's employer, Frito-Lay, designed and installed in its Williamsport plant. Frito-Lay placed the volumetric feeder on the production line, added equipment to coordinate the feeder's operation with the operation of the line and attached the feeder to a power supply. Specifically, it placed the volumetric feeder, as manufactured by Acrison, upon a support structure or frame similar to a table, and, after connecting it to control circuits, hooked it up to a power source for operation. Joint Appendix (Jt. App.) at A-1134-35, A-1137-38. Hitesman claimed that the

[1] Acrison also contends that it did not manufacture the particular volumetric feeder in question and that Hitesman voluntarily assumed the risk of injury when he put his hand in the feeder to clean it. These contentions are renewed here. We hold they lack merit. These issues were properly submitted to the liability jury and it resolved them against Acrison.

volumetric feeder was defective because its hopper exposed workers to an unguarded shear or pinch point which could have been protected by an interlocking grate guard. *Id.* at A-299-300.

The case was submitted to the liability jury for a special verdict on written interrogatories. Question number 9 asked the jury: "Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?" The jury answered yes. The jury also found that Frito-Lay was better able than Acrison to determine the location and type of safety devices for volumetric feeders in its production line (question number 10); that it was the custom for Frito-Lay, as the designer and manufacturer of the production line in which the volumetric feeder is to be installed, to determine the location and type of safety devices to be used with the feeder (question number 11); and that the evidence was equally balanced as to whether it was more feasible for Frito-Lay or Acrison to incorporate safety devices into the feeder (question number 12). *Id.* at A-1291-94.

Question number 9 was phrased in terms slightly different from those the court had used in instructing the jury on the component part defense. In its instructions, the district court told the jury:

> If you find that Acrison made the volumetric feeder on which Mr. Hitesman was injured, you must then determine *whether the volumetric feeder was a component.* By that I mean *was it designed to be used in conjunction with other equipment on a production line that Acrison did not design or was it a completed product that was to be used by itself?*

Id. at A-929 (emphasis added).

After receiving the liability jury's answers to the special verdict questions, the district court held that question number 9 did not properly frame the factual issue of whether the component part defense applied to this case. *Id.* at A-1301. Instead, the district court held that the jury should have been asked the question:

> Was the volumetric feeder, including the hopper, the result of substantial work by more than one party?

Id. Thereupon, acting pursuant to Federal Rule of Civil Procedure 49(a), the district court reframed the factual issue, held that each party had waived a jury trial on it, and answered it adversely to Acrison by finding that the volumetric feeder was a complete product when Acrison sold it and that Acrison was therefore responsible for the lack of a guard. The court then concluded that judgment on the liability issue should be entered in Hitesman's favor since the jury found that Acrison had manufactured and sold this particular volumetric feeder, it was defective after it left Acrison's control, and the defect was a substantial factor in causing Hitesman's injuries. *See* Special Verdict Questions 1-3, *id.* at A-1283-85.[2]

The trial then proceeded before a separate jury on the damage issue. After that jury's verdict, judgment was entered against Acrison for the $391,676.16 in damages it found. Acrison moved for reconsideration. After the district court denied those motions, Hitesman petitioned for the imposition of delay damages pursuant to Pennsylvania Rule of Civil Procedure 238. The district court granted that petition and directed the clerk to add $42,169.38 in delay damages to the judgment. Acrison then filed this timely notice of appeal.[3] One of its primary arguments on appeal is that the district court's actions on the liability issue pursuant to Rule 49(a) were erroneous.

The district court had subject matter jurisdiction over this diversity case under 28 U.S.C.A. § 1332(a) (West Supp. 1989). We have appellate jurisdiction under 28 U.S.C.A. § 1291 (West Supp. 1989). We exercise plenary review over the issue of whether the district court erred in applying Federal Rule of Civil

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[2] The court did not deal further with the jury's answers to questions 10, 11 and 12.

[3] Acrison's contention that the imposition of delay damages was erroroneous fails. *Fauber v. KEM Transp. Equip. Co.*, Nos. 88-5729 & 88-5765 (3d Cir. May 31, 1989); *Jarvis v. Johnson*, 668 F.2d 740 (3d Cir. 1982).

Procedure 49(a). However our review of the district court's resolution of an omitted factual issue is for clear error.

II.

With respect to its component part defense, Acrison contends that the jury's answers to questions 9 through 11 compelled entry of judgment in its favor on the liability issue; that Rule 49(a) has no application to this case because the question resolved all the factual issues necessary to reach a legal conclusion; that the district court's finding on the reframed question deprived Acrison of its Seventh Amendment right to a jury trial and amounted to a grant of judgment n.o.v. to Hitesman despite the jury's determination that the volumetric feeder was only a part of Frito-Lay's production line; and that it, not Acrison, was in a better position to install a safety guard. In support, Acrison cites *Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978).

After reviewing the record in this case, we conclude that the district court did not err in applying Rule 49(a). The special verdict questions did not include a threshold question which must be answered before the balancing factors set out in *Verge* are reached. Since the district court's actions under Rule 49(a) were meant to answer this necessary threshold question, and since there was evidence to support the district court's finding on that issue and since Acrison's other liability issues lack merit, we will affirm.

The special verdict questions asked the jury whether the volumetric feeder was merely a component part of a production system which would be completed by the addition of other machinery (question number 9) and, if so, whether Acrison or Frito-Lay was better able to determine the location and type of safety devices (question number 10), if there was a trade custom as to whether the manufacturer or the operator of the production line should install a safety device (question number 11) and who could more easily do it (question number 12). The jury's answers to the first three of these questions favored Acrison. Acrison argues that these questions were sufficient to determine the component part defense and that the jury's answers to them resolved the matter in Acrison's favor.

However, the jury was not given any question asking whether this feeder was the product of substantial work by more than one party. Jt. App. at A-930, A-1302. Concluding that such a factual determination was needed under Pennsylvania law, the district court reframed the question under Federal Rule of Civil Procedure 49(a)* and found, from the evidence, that the volumetric feeder was not the product of substantial work by more than one party. Therefore, it concluded that the so-called component parts defense did not apply in this case.

Acrison relies upon our decision in *Verge*. There, we stated that the question of who is liable for the failure to install a necessary safety device on a piece of equipment which is itself a component part of a larger system functioning as a whole is dependent upon three factors: trade custom, relative expertise and practicality. Acrison is correct in pointing out that these factors were indeed presented to the jury by special verdict questions 9 through 12. However, Acrison skips over a threshold requirement for their application – whether the defective product was a component or a finished product when it left the manufacturer. It is a component only if several parties make substantial contributions to its creation. Otherwise, *Verge* does not apply. *Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979); *Heckman v. Federal Press Co.*, 587 F.2d 612, 617 (3d Cir. 1978). In *Holloway*, for example, the plaintiff was injured by the explosion of a tank designed to fit on a chassis manufactured by a party other than the tank manufacturer. It

---

* Rule 49(a) provides, in material part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

was determined that the product in question was the tank, wholly made by one defendant. We therefore held *Verge* inapplicable because the tank was not manufactured by more than one company.

The issue on which this case was tried was not whether the production line was defective, but whether the feeder was defective for failure to incorporate an interlock guard. Before it could avail itself of the component part defense, Acrison had to get a factual determination that work on the feeder was done by more than one party. This resolution was essential to Acrison's defense and the application of the *Verge* factors. The district court did not err in framing the missing question and supplying an answer to it.

For the foregoing reasons, we will affirm the district court.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/ William D. Hutchinson
Circuit Judge

Supreme Court, U.S.
FILED
NOV 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-726

In The

Supreme Court of the United States

October Term, 1989

ACRISON, INC.,

Petitioner,

vs.

JOHN HITESMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this products liability case, the jury answered special verdict questions finding that the product as sold by the Defendant was defective and that Plaintiff's injuries had been caused by this defect. As an affirmative defense, the Defendants attempted to shift responsibility for the defective product to Plaintiff's employer, who had placed the defective product in service upon a production line designed by the employer. Before this affirmative defense becomes applicable under Pennsylvania law, the Defendant must obtain a factual determination that the machine at issue was the product of substantial work by more than one party. No question was asked concerning this issue of fact. The District Court, therefore, applied Rule 49(a), Fed.R.Civ.Proc., to make a finding on this omitted issue of fact. The Court of Appeals agreed that Pennsylvania law required the omitted factual issue to be decided before the defense applied, and held that the District Court had properly framed the missing question and properly supplied an answer to it.

QUESTION PRESENTED:

WHERE FACTUAL QUESTIONS CONCERNING AN AFFIRMATIVE DEFENSE WERE SUBMITTED TO THE JURY BUT A THRESHOLD ISSUE OF FACT ESSENTIAL TO THE DEFENDANT'S AFFIRMATIVE DEFENSE WAS NEVER REQUESTED BY EITHER PARTY OR SUBMITTED BY THE COURT, IS IT PROPER FOR THE COURT TO FRAME AND ANSWER A QUESTION ON THIS OMITTED ISSUE OF FACT?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 8

THE INTERROGATORIES GIVEN TO THE JURY DID NOT INCLUDE A FACTUAL QUESTION ESSENTIAL TO ACRISON'S DEFENSE. THE CONSEQUENCE UNDER RULE 49(a) OF SUCH A FACTUAL OMISSION IS THAT THE RIGHT TO HAVE THAT FACT ISSUE DETERMINED BY THE JURY IS WAIVED AND IT IS THE COURT'S RESPONSIBILITY TO MAKE SUCH A FINDING. THE APPLICATION OF RULE 49 IN THIS CIRCUMSTANCE PRESENTS NEITHER AN IMPORTANT QUESTION OF FEDERAL LAW NOR A DECISION CONFLICTING WITH THE OPINIONS OF OTHER CIRCUITS.

1. THE CASE INVOLVES NO IMPORTANT QUESTIONS OF FEDERAL LAW. 8

2. THERE IS NO CONFLICT IN THE CIRCUITS. 13

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Cryovac, Inc., 862 F.2d 910, 915 (1st Cir. 1988) 9, 16

Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987) ... 13, 14

Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984) 15

Guidry v. Kem Manufacturing Co., 598 F.2d 402 (5th Cir. 1979) *reh. den.* 604 F.2d 320 (5th Cir. 1979) *cert. den.*, 445 U.S. 929 (1979) 18, 19

Harmon v. Grande Tire Co., 821 F.2d 252 (5th Cir. 1987) 15

Heckman v. Federal Press Co., 587 F.2d 612, 617 (3d Cir. 1978) 10

Holloway v. J. B. Systems, Ltd., 609 F.2d 1069, 1073 (3d Cir. 1979) 10

In Re Randall, 712 F.2d 1275 (8th Cir. 1983) 17, 18

Randall v. Warnaco, Inc., Hirsch-Weis Div., 677 F.2d 1226 (8th Cir. 1982) 17

Verge vs. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978) 10

RULES

Rule 49(a), Fed. R. Civ. Proc. ..... *passim*

STATEMENT OF THE CASE

On September 4, 1987, Plaintiff, John Hitesman, commenced this case against Defendant, Acrison, Inc. Mr. Hitesman's Complaint set forth that on September 6, 1985, while cleaning a volumetric feeder manufactured and sold by the Defendant, Plaintiff had sustained serious injuries which had required years of reconstructive surgeries, and had caused a physical deformation of his hand and a permanent disability. Mr. Hitesman's claims were based upon products liability and set forth that the volumetric feeder and hopper chamber were defective because they lacked adequate safety devices and warnings. Mr. Hitesman specifically claimed that the volumetric feeder was defective because it lacked an interlocked guard.

In an Amended Answer, Defendant asserted as an *affirmative defense* that the volumetric feeder was a component part of a production line designed and manufactured by Mr. Hitesman's employer, and that Mr. Hitesman's employer and not Defendant was the party properly responsible for installing the safety guard. (A 12; A 30). The Defendant referred to this as the "component part defense."

Throughout the case, Plaintiff had maintained that the "component part defense" did not apply to the facts of the present case because the Defendant was the only party involved in the design and manufacture of the volumetric feeder, and that it was the volumetric feeder which was at issue in this case, and not the production line.

The trial was bifurcated into liability and damage phases, both phases being tried to the same jury. The case was subject to the laws of Pennsylvania as interpreted by state and federal courts. (A 12). In response to the special verdict questions, the jury answered as follows:

> 1. Did Acrison sell the volumetric feeder involved in the injuries to Plaintiff, John Hitesman?
>
> *Yes.*
>
> 2. Was the volumetric feeder at issue in this case defective at the time it left Acrison's control because it lacked an interlocked guard?
>
> *Yes.*
>
> 3. If your answer to the previous question is "yes," is the absence of an interlocked guard a substantial factor in bringing about and actually causing John Hitesman's injuries?
>
> *Yes.*

In order to establish liability, Mr. Hitesman had to establish that Acrison had manufactured the volumetric feeder, that the volumetric feeder was defective at the time it left the control of the Defendant and that this defect was a substantial factor in causing his injuries. As found by the jury and as affirmed by the Court, the evidence established liability against the Defendant. (A 23).

While the facts found by the jury which imposed liability upon the Defendant focused upon the volumetric feeder, the Defendant attempted in its question on the "component part defense" to focus upon the fact that the volumetric feeder was incorporated into a production line, which production line required the addition of other

machinery by Plaintiff's employer. The special verdict question which the Defendant claimed established its "component part defense" reads as follows:

> 9. Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?
>
> *Yes.*

After returning the special verdict questions, the Trial Court requested the parties to submit briefing on the issue of in whose favor judgment should be entered on the special verdict returned by the jury. After extensive briefing, the Court entered judgment in favor of Mr. Hitesman, finding that the jury's answers established that Acrison had sold the volumetric feeder which was defective at the time it left Acrison's control and that this defect was a substantial factor in causing Mr. Hitesman's injuries. With regard to Acrison's "component part defense," the Trial Court found that the parties had failed to submit any question on an essential factual determination concerning this defense.

> Special Verdict Question No. 9 misses the point. The proper inquiry for the purpose of component parts defense, should have been the volumetric feeder alone. The jury should have been asked the question:
>
> Was the volumetric feeder including the hopper the result of substantial work by more than one party?
>
> Neither Acrison, nor John Hitesman, proposed such a special verdict question.

(A 14-15). Because this essential factual determination was omitted from the special verdict questions, the Court

found that each party had waived a right to trial by jury on it pursuant to Fed.R.Civ.P. 49(a). Applying Rule 49(a), the Court found that the volumetric feeder, including the hopper, was not the product of substantial work by more than one party.

On October 31, 1988, Acrison filed a Motion for Reconsideration of the Court's October 21, 1988, Opinion and Order, and a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for an Order Granting a New Trial. At no point in these motions or the briefing filed in support of these motions did Defendant ever raise or argue that the Trial Court had improperly applied Rule 49(a). In fact, in its motion and brief on the Motion for Reconsideration, Defendant specifically asked the Court to amend its factual determination that the volumetric feeder was not the product of substantial work by more than one party.

> Acrison has asked us to amend our opinion and order and rule that the volumetric feeder that injured John Hitesman was in fact the product of substantial work by more than one party. Upon making this proposed ruling, Acrison urges us to enter judgment in its favor.

(A 19).

The Defendant took an appeal to the Third Circuit claiming that special verdict questions 9 through 11 established Defendant's "component part defense" and that the Trial Court had improperly applied Rule 49(a).

In its Opinion, the Third Circuit agreed with the Trial Court and found that the special verdict questions simply did not include a "threshold question which must be answered." (A 33). The Court noted that "the jury was

not given any question asking whether the feeder was the product of substantial work by more than one party" and that it was therefore proper under Rule 49(a) for the Trial Court to make a finding on this omitted issue of fact. In so holding, the Court stated:

> The issue on which this case was tried was not whether the production line was defective, but whether the feeder was defective for failure to incorporate an interlocked guard. Before it could avail itself of the component part defense, Acrison had to get a factual determination that work on the feeder was done by more than one party. This resolution was essential to Acrison's defense and the application of the *Verge* factors. The District Court did not err in framing the missing question and supplying an answer to it.

(A 35). While the Court of Appeals used the word "reframe" in its Opinion, the Court of Appeals made clear that the basis of its holding was that no question was submitted to the jury on the omitted issue of fact, that the agreed-to questions submitted simply did not address this essential issue of fact, and that the District Court properly framed the missing factual question and properly supplied an answer to it.

Finally, in Petitioner's statement of facts there are inaccurate and misleading assertions. First, the Defendant asserts at pages 8 and 10 of its Petition that the Court excluded its proposed Question 9 and specifically Petitioner states:

> Furthermore, the District Court had earlier ruled that the phrase "incomplete product" made the same factual inquiry as Acrison's proposed question 9, which would have explicitly

> asked the jury whether Frito-Lay made "substantial changes and additions" to the feeder.

(Petition for Writ of Certiorari, p.10). This assertion by the Defendant is simply wrong and misinforms the Court as to what occurred. The following portion of the record shows that Defendant was solely responsible for the exclusion of proposed question 9.

> THE COURT: Well let's see what 10 is then. Are the volumetric feeders sold by Acrison incomplete products that are part of a production system to be completed by the addition of other machinery by Frito-Lay or others over which Acrison had no control? Well, why is that important?
>
> MR. FORNARI: Why is that what? I'm sorry, Your Honor.
>
> THE COURT: Why is that important?
>
> MR. FORNARI: Well, I think that 9 and 10 are really two versions of the same question. We tried to put them in different form.
>
> THE COURT: Well, gees, if we get two versions of the same question you're inviting an inconsistent verdict. If it's one question we ought to be able to do it that way.
>
> MR. FORNARI: All right. I would be – either one of those.
>
> THE COURT: All right. Well, you pick which one you want us to put in and we'll throw the other one out at this point.
>
> MR. FORNARI: Let's take 10.
>
> THE COURT: Do you want 10 rather than 9?
>
> MR. FORNARI: Yes, sir.

THE COURT: All right. Defendant wants 10 in place of 9 and 10. All right. Now –

(As set forth in the Joint Appendix submitted to the Court of Appeals at A 694-695).

At page 8 of the Petition, the Defendant sets forth a proposed point for charge submitted by the Plaintiff. Unfortunately, the Defendant has failed to include the entire proposed point. First, at the beginning of this point for charge Plaintiff stated unequivocally that Defendant's so-called "component part defense" was simply not applicable in the present case. Second, Petitioner omitted the final paragraph of this point for charge which states:

> If you find the volumetric feeder was a substantially finished product when sold by Acrison, then the law holds that the manufacturer or seller of the product has the responsibility to provide necessary safety devices or warnings. In other words, if you find the volumetric feeder was a substantially finished product when sold by Acrison, the issue regarding safety devices is limited solely to whether the volumetric feeder lacked any element necessary to make it safe for its intended or foreseeable use at the time it was sold by Acrison.

(As set forth in the Joint Appendix submitted to the Court of Appeals at A 1279).

Finally, Petitioner asserts that the jury's answer to special verdict question 9 was a finding that the volumetric feeder was merely a component part which was to be completed by the addition of other machinery by Frito-Lay. (Petition, p. 5). What this question establishes is that the "volumetric feeder . . . [was] merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay." The fact that

the volumetric feeder was to be incorporated into a production line where other separate machinery was added had absolutely nothing to do with whether the product was manufactured by several parties or was the result of substantial work by more than one party. It does show that the production line was the result of substantial work by more than one party; but, as found by the Trial Court and the Third Circuit, the product at issue in this case is a volumetric feeder and not a production line. As found by the Court of Appeals, absent a determination that the volumetric feeder was the product of substantial work by more than one party, Defendants' affirmative defense "does not apply" and the factors set forth in questions 9 through 12 are irrelevant. (A 34).

REASONS FOR DENYING THE WRIT

THE INTERROGATORIES GIVEN TO THE JURY DID NOT INCLUDE A FACTUAL QUESTION ESSENTIAL TO ACRISON'S DEFENSE. THE CONSEQUENCE UNDER RULE 49(a) OF SUCH A FACTUAL OMISSION IS THAT THE RIGHT TO HAVE THAT FACT ISSUE DETERMINED BY THE JURY IS WAIVED AND IT IS THE COURT'S RESPONSIBILITY TO MAKE SUCH A FINDING. THE APPLICATION OF RULE 49 IN THIS CIRCUMSTANCE PRESENTS NEITHER AN IMPORTANT QUESTION OF FEDERAL LAW NOR A DECISION CONFLICTING WITH THE OPINIONS OF OTHER CIRCUITS.

1. THE CASE INVOLVES NO IMPORTANT QUESTIONS OF FEDERAL LAW.

The record facts and the law applicable to the present case demonstrate that the jury was never given any question on a factual issue which was essential to the affirmative defense asserted by the Defendants. Where such a

factual question is omitted from the special interrogatories submitted to the jury, Rule 49(a) states that the parties have waived their right to a trial by jury on this omitted issue of fact and the Federal District Court may make a finding on this omitted issue of fact. This is precisely what was done in the present case and despite the Petitioner's semantic arguments, the present case involves a simple and straightforward application of Rule 49(a).

Under Rule 49, the burden of securing the jury verdict on all the material issues of fact is placed squarely upon the parties. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 915 (lst Cir. 1988). Rule 49 clearly informs the parties that jury trial will be waived as to any issues of fact not submitted. Trial by jury on an issue of fact is only lost when a party fails to demand that the omitted issue of fact be submitted to the jury. *Id.*, at 916. Waiver of a jury trial occurs not by edict of the Court, but by virtue of the parties' failure to demand a submission of the issue of fact to the jury. Where a party agrees to the special interrogatories submitted, he cannot later complain when it is found that a question of fact has been omitted. If the rule were not so read, a party could, as did the Defendant in the present case, agreeably acquiesce to perceivable error and then lie in wait and ask for another trial when the result is not to his liking. *Id.*, at 918.

The present case involves a case of strict products liability. Under Pennsylvania law as interpreted by the State and Federal Courts, a unique affirmative defense exists under products liability whereby if the Defendant manufacturer can prove that the product at issue was the result of substantial work by more than one party, the

Defendant can look to factors such as relative expertise and practicality to establish that another party which made substantial contributions to the finished product was responsible for the defect. This defense was originally set forth in the case of *Verge vs. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978), and is often referred to as the *Verge* defense. However, a necessary factual predicate for the application of this defense is that several parties made substantial contributions to the creation of the defective product. Absent this factual predicate, there is simply no basis for even considering this defense. (A 34-35); see, *Heckman v. Federal Press Co.*, 587 F.2d 612, 617 (3d Cir. 1978); *Holloway v. J. B. Systems. Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979). Therefore, in order for the Defendant to have the jury consider the factors involved in this specialized defense, the Defendant initially had to obtain a factual determination that the volumetric feeder, the product at issue, was the result of substantial work by more than one party.

As found by the Trial Court and the Court of Appeals, this factual issue was simply never submitted to the jury in the interrogatories agreed to by the parties. (A 15; A 32). The Court of Appeals, therefore, held that it was not only correct, but necessary, for the Trial Court to frame a question and supply an answer to this omitted issue of fact. (A 35).

Despite the Court of Appeals' clear holding that no question was submitted to the jury on the omitted issue of fact, the Defendant claims that the use of the word "reframe" in the earlier portions of the Opinion indicates that the issue of fact was submitted to the jury and that the jury's factual determination was "set aside." (Petition

for Writ of Certiorari, p. 13). The question which the Defendant argues demonstrates that this issue of fact was submitted to the jury reads as follows:

> 9. Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?

It beggars reason to argue that this question even remotely addresses the factual issue of whether the volumetric feeder was the result of substantial work by more than one party. At most, this finding of fact establishes that the volumetric feeder was a component of a production line to be completed by the addition of other machinery by Frito-Lay. However, as stated by the Third Circuit,

> The issue on which this case was tried was not whether the production line was defective, but whether the feeder was defective for failure to incorporate an interlocked guard.

(A 35). There was absolutely no reason to set aside the finding of fact made in question 9, since this finding simply does not address the omitted issue of fact. The Defendant's argument completely ignores the rationale and basis set forth in the final two pages of the Third Circuit's Opinion. The Opinion demonstrates that the Court clearly understood that the relevant issue of fact was completely omitted from the interrogatories submitted to the jury, that the questions submitted by the Defendants simply did not address this issue, that neither party requested this issue of fact be submitted to the jury, and that the District Court did not err in applying Rule 49 when making its finding on this omitted issue of fact. (A 34-A 35).

The Defendants also argue that their proposed question No. 9 was excluded by the Court and that this question "would have explicitly asked the jury whether Frito-Lay made 'substantial changes and additions' to the feeder." First, this argument is simply irrelevant since a party which agrees to the questions and the form of questions submitted to the jury cannot later complain that an issue of fact was not submitted to the jury. Second, the Trial Court did not rule that proposed question No. 9 made the same factual inquiry as proposed question No. 10, but rather the Defendant asserted to the Court that proposed questions 9 and 10 were two versions of the same question and Defendant specifically chose to submit only proposed question 10. Finally, proposed question 9, as set forth at page 7 of the Petition, concerns whether the Defendant expected Frito-Lay's personnel to make changes or additions to the switching and power to the volumetric feeder after it was sold. There was no dispute in this case that Acrison sold its volumetric feeders without a power cord and a switch to turn the machine on and off. However, every physical piece of the volumetric feeder was designed and manufactured by Defendant Acrison and other than the complete lack of safety devices, the only thing necessary to make the volumetric feeder operational was the supply of power to the motor. This question, therefore, would have merely asked the jury to answer "yes" to uncontested factual issues and would have in no way resolved the essential factual determination of whether the volumetric feeder was the product of substantial work by more than one party.

The record demonstrates, as found by both the Trial Court and the Court of Appeals, that the parties simply failed to address, let alone demand, that any question be submitted to the jury on whether the volumetric feeder was the result of substantial work by more than one party. Where a party has agreed to the interrogatories submitted to the jury, the party cannot be heard later to complain when the Court properly applies Rule 49(a) to make the omitted factual determination. While the present case involves such an improper, after-the-fact complaint concerning an omitted issue of fact, it does not involve an important question of federal law on which there is any dispute.

2. THERE IS NO CONFLICT IN THE CIRCUITS.

As to Defendants' claim that there is a conflict in the Circuits, a brief review of the case law will demonstrate the baselessness of this assertion. At pages 13 and 14 of its Petition, the Defendant lists cases where Rule 49(a) was applied and the Courts made factual determinations with regard to significant and essential factual issues which controlled whether liability could be imposed. In all these cases, the jury was instructed and asked factual questions on issues of liability and applicable defenses; however, in each case, an essential factual issue concerning liability or a defense was never submitted to the jury.

For example, the Second Circuit in *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987), submitted the issue of enterprise and the participation of the defendants in the enterprise to the jury. However, the jury was only permitted to answer questions concerning participation in an

enterprise which included the defendant county and not an enterprise which only included three other defendants. The Appeals Court believed that if the jury had been asked about the participation of three of the defendants in an enterprise which included only themselves and not the county, RICO liability could have been established. The District Court had refused the plaintiff's request to make factual findings on this omitted enterprise theory. In vacating and remanding the District Court's decision, the Court of Appeals stated as follows:

> Rule 49(a), however, required the Court only to make a finding on this issue as a matter of fact. The ultimate question after trial is whether or not the plaintiff has proved its claim. If the interrogatories given to the jury do not include the factual question needed for a complete answer to the ultimate question, the consequence under Rule 49(a) is not that the plaintiff's case is to be dismissed, but simply that the right to have that fact issue determined by the jury is waived and any gap is to be filled in by the Court.

Id., at 731. While the issue of enterprise was clearly submitted to the jury, the issue of fact with regard to the specific enterprise was omitted. The Court, therefore, held that it was proper for the Trial Court to frame a question with regard to this enterprise, and to make a finding on this omitted issue of fact. In the present case, in order for the Defendant to pursue its "component part defense," it had to obtain a factual determination that the volumetric feeder was the result of substantial work by more than one party. This issue of fact was simply not submitted to the jury, and in keeping with the proper application of Rule 49(a), as in *Cullen*, the Court was

required to and did make a finding on this omitted factual issue.

The Fifth Circuit in *Harmon v. Grande Tire Co.*, 821 F.2d 252 (5th Cir. 1987), confronted a case in which the jury was specifically charged on liability under two separate statutory sections. However, the question submitted to the jury relating to this charge, while addressing the defendant's liability under one section, failed to address the defendant's liability under both sections. The defendant attempted to argue that by virtue of the charge the question of violation of this section was implicitly included within the questions submitted to the jury. The Court found that this question was simply not asked and that the Court must address itself to the literal questions asked to the jury and not what one party or another intended to be asked. In *Harmon*, as in the present case, the question is not what issues of fact a party or parties believed, hoped, or wished were included in the specific questions submitted to the jury, but what issues of fact were or were not specifically asked.

The Tenth Circuit in *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324 (10th Cir. 1984), reviewed a case where the jury had been asked questions with regard to liability under contract and negligence theories, a question with regard to the amount of damages suffered, and a question with regard to allocation of damages under the negligence claim. However, the jury had not been asked to allocate the overall damages under the contract claim. Defendant argued that the allocation of the overall damages under the negligence claim indicated that the jury had allocated damages solely to a negligence claim. The Court noted that the interrogatories simply did not ask

the jury to determine the amount of damages sustained on each claim, and that it was, therefore, proper for the Court to supply a finding on this omitted issue of fact.

The First Circuit in *Anderson v. Cryovac. Inc.*, 862 F.2d 910 (lst Cir. 1988), discussed Rule 49 in a situation where an interrogatory submitted to the jury would ordinarily have required the jury to make a determination on the omitted issue of fact. *Id.* at 917. However, because of the compound conjunctive nature of the question submitted to the jury, there was no clear-cut factual submission to the jury on the essential issue of fact. The Court found that the plaintiff failed to object to the proposed interrogatory and made no objections at side bar to the interrogatory. The Court noted that it was the burden of the parties to assure that all of the issues of fact were squarely presented to the jury and that if the questions omitted any material issue of fact, it was proper for the Court below to find the facts which had been omitted. The Court specifically held that there was no denial of the parties' right to trial by jury since waiver only occurred when a party failed to exercise its right to demand submission of an omitted issue of fact.

As the above cases demonstrate, under Rule 49, where there exists an omitted issue of fact, the only issue relevant to whether the District Court should make a finding with regard to this omitted issue is whether the party has demanded submission of this specific issue of fact to the jury. Where no such demand has been made and the party has agreed to the interrogatories submitted to the jury, it is the District Court's responsibility to make a finding on any omitted issue of fact. Whether a party or both parties intended to submit the issue of fact to the

jury is of no consequence. Whether the omission occurred inadvertently, purposefully, or by some other reason, is simply irrelevant. It is the parties' responsibility to assure that all issues of fact which they desire to be submitted to the jury are, in fact, submitted to the jury. If a party agrees to the interrogatories as submitted, he cannot later complain if those interrogatories fail to include a question concerning an essential issue of fact. In such a case, the party has waived his right to a jury trial on any omitted issue of fact and it is for the Trial Court, under Rule 49(a), to make a finding on this omitted issue of fact.

As to the two cases cited by the Defendants as support for the existence of a conflict in the Circuits, these cases simply do not support the Defendants' position. In *In Re Randall*, 712 F.2d 1275 (8th Cir. 1983), the plaintiff had brought separate negligence and strict liability claims against the defendant. After plaintiff had presented her case in chief, the District Court directed a verdict for defendant on the plaintiff's negligence count. *Id.* at 1276. The jury was then charged on the issue of proximate causation, and this issue of fact along with the other issues of fact necessary to establish strict liability was submitted to the jury. However, separate interrogatories were not propounded, but the jury was generally asked to return a verdict on strict liability. *Randall v. Warnaco. Inc., Hirsch-Weis Div.*, 677 F.2d 1226 (8th Cir. 1982). The jury returned a general verdict finding no strict liability; however, while the factual issue of proximate cause was submitted to the jury, there was no way from this general verdict to determine what the jury's finding had been. The Eighth Circuit subsequently reversed the Trial Court and held that it had erred in failing to submit plaintiff's

negligence claim to the jury and remanded the case for a new trial. On remand, the defendant moved for summary judgment and the Trial Court invoked Rule 49(a) and made a finding in defendant's favor on the issue of proximate cause on the alleged basis that the jury had omitted such a finding in its original verdict on the strict liability count. The Eighth Circuit again reversed finding that the issue of proximate causation had, in fact, been specifically submitted to the jury, and that it was "erroneous to say that the parties had waived their right to a jury trial on the issue of proximate cause under the negligence count. The negligence count was withdrawn from the jury by the Trial Judge." *Id.* at 1277. The Court further noted,

> Rule 49(a) contemplates the trial judge making an omitted finding on the special verdict form *before* an entry of final judgment. At the time the trial court attempted to amend this special verdict, final judgment on the verdict had been previously entered in 1980 and the cause reversed and remanded for a new trial.

Id. at 1277 n. 3. In the present case, unlike *Randall*, the Court did not remove the strict liability claim or the asserted affirmative defense from the jury. The Court merely made a necessary factual determination with regard to the strict liability claim and the Defendants' affirmative defense, on "a factual question needed for a complete answer to the ultimate question." Rule 49(a). This is exactly the procedure followed by all the Circuits and it is not even remotely similar to the convoluted and improper procedure followed in *In Re Randall*.

In *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402 (5th Cir. 1979), *reh. den.* 604 F.2d 320 (5th Cir. 1979), *cert. den.*,

445 U.S. 929 (1979), the jury was directly asked whether defendant Kem Manufacturing Co. was negligent. Unfortunately, the jury was asked this question twice. *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979). In one question, the jury found that the defendant was not negligent and in another question the jury found that the defendant was negligent. The Fifth Circuit noted that application of Rule 49(a) was improper in this case since the question of whether the defendant was negligent was not omitted, but was asked twice with irreconcilably inconsistent answers. This case, therefore, simply had nothing to do with an omitted issue of fact, but rather involved irreconcilably inconsistent answers which required a retrial of the case.

In the present case, despite the Defendants' semantic arguments with regard to the words "frame" and "reframe," the Opinions of both the Trial Court and the Court of Appeals clearly demonstrate that the present case involves a straightforward application of Rule 49(a). The simple fact is and remains that "the jury was not given any question asking whether this feeder was the product of substantial work by more than one party." (A 34). All the Trial Court did was apply Rule 49(a) as it was meant to be applied, and made a finding with regard to this omitted issue of fact. This is precisely how Rule 49(a) was intended to be applied, and how it has been applied in all the Circuits. The present case, therefore, involves neither an important question of Federal Law, nor does it remotely concern a conflict among the Circuits.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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